90-1013

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM, 1990

STEPHEN C. STEM,

Petitioner,

V.

RALPH AHEARN AND CHRIS CARD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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November, 1990

QUESTIONS PRESENTED

1. Whether Petitioner's claim for injunctive relief is barred by the Eleventh Amendment.

2. Whether individuals employed as field workers for a county childrens protective agency are entitled to a good faith exemption under the Eleventh Amendment.

LIST OF OTHER PARTIES

All of the parties in the United States Court of Appeals for the Fifth Circuit are listed in the caption.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

_____

John K. Grubb, on behalf of STEPHEN C. STEM, petitions for a Writ of Certiorari to

review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals has not yet been reported. It is reproduced in Appendix A to this Petition.

There was no formal opinion of the District Court. The District Court's orders are reproduced in Appendix B to this Petition.

JURISDICTION

The judgment of the Court of Appeals (Appendix A, infra, pp. 1a-8a), was entered on August 13, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eleventh Amendment to the United States Constitution provides in relevant part:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

2. 42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of

the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

3. 28 U.S.C. § 1254(1) provides:

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATEMENT OF THE CASE

Petitioner, STEPHEN C. STEM, filed a complaint against RALPH AHEARN

(hereinafter "AHEARN"), CHRIS CARD (hereinafter "CARD"), HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICE (hereinafter "HCCPS"), and HARRIS COUNTY, in the United States District Court for the Southern District of Texas, Houston Division, on August 15, 1988. The complaint alleged that Appellants acted in violation of 42 U.S.C. § 1983, 42 U.S.C. § 1985, and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The Attorney General of Texas answered the civil complaint on behalf of all the named Defendants.

Petitioner, STEPHEN C. STEM'S Complaint arose from Respondents, RALPH AHEARN'S and CHRIS CARD'S negligence in the investigation and handling of a sexual abuse complaint.

Prior to Respondents getting involved in the case, Petitioner and his estranged wife had agreed informally to share custody of

their two minor children. Subsequently, the wife believed Petitioner sexually abused their minor daughter after the child was returned to the wife from a weekend visit with Petitioner. The wife never informed Petitioner of the sexual abuse allegation. The wife took the child to the hospital for a number of examinations. The examinations resulted in no medical evidence of any sexual abuse. In accordance with standard procedure, the examining physician notified HCCPS of the alleged sexual abuse.

Respondent, AHEARN, is the child protective service worker who was assigned to the case. Respondent, CARD, was AHEARN'S supervisor. Respondent, AHEARN, never interviewed Petitioner or notified him of the investigation.

On August 28, 1986, Respondent, AHEARN, met with Petitioner's wife and the minor child. They were taken into a room at the HCCPS offices where they met with Respondent, AHEARN, for approximately one hour. Then Respondent, AHEARN, took the child into a room by herself to videotape her, but the child would not recite the story about the alleged abuse. Respondent, AHEARN, then got the child's mother to come into the video room. Throughout the entire video, the child's mother remained present and encouraged the child several times. Several statements made in the videotape are inconsistent with purported statements made to Respondent, AHEARN, in an unrecorded telephone conversation with the child.

On August 27, 1986, Petitioner's wife had her attorney file a request that she be appointed Sole Managing Conservator of the

children. The request was filed with the Court after the doctor had examined the child and found no physical evidence of sexual abuse. This Motion was filed prior to the meeting between Petitioner's wife and Respondent, AHEARN.

A hearing was set in the Family Court by the attorney for Petitioner's wife to be heard on September 9, 1986. From the time the Motion was filed until the hearing date, Petitioner was not permitted to see or have any contact with his children and was given no explanation for this deprivation. On the hearing date was the first time Petitioner or his attorney learned of the sexual abuse allegations against Petitioner. The hearing was postponed and reset. The hearing was rescheduled for January 16, 1987. From August 27, 1986 through January 16, 1987,

Petitioner had virtually no contact or visitation with his children.

As a result of Respondent, AHEARN'S unfounded finding that Petitioner abused his child, Petitioner lost the Joint Managing Conservatorship agreement he had with his wife. Also as a direct result of the sexual abuse allegations of Respondent, AHEARN, Petitioner's wife was appointed the Managing Conservator of the children and was given all of the rights of a parent to the exclusion of Petitioner, except for limited visitation.

Each Defendant filed a Motion for Summary Judgment. The District Court ruled that HCCPS is an organizational arm of the Texas Department of Human Services (hereinafter ("TDHS") and that such a state agency enjoys Eleventh Amendment immunity. The District Judge further ruled that Harris County cannot be held vicariously liable for the actions of

state agencies as charged in the Complaint. The Judge granted HCCPS and TDHS' Motion for Summary Judgment.

The District Court declined to grant Summary Judgment in favor of AHEARN or CARD, reasoning that neither enjoys Eleventh Amendment immunity or qualified immunity.

The Defendants, AHEARN and CARD, filed an interlocutory appeal with the United States Court of Appeals, Fifth Circuit. The Appeal was limited to the issue of immunity, if any, available to child protective service workers, in their official and individual capacities.

The United States Court of Appeals, Fifth Circuit, granted Summary Judgment in favor of AHEARN and CARD. The Fifth Circuit found that the individual Defendants, AHEARN and CARD, had official and qualified immunity.

REASONS FOR GRANTING THE PETITION

I.

The threshold issue is whether Petitioner's suit for injunctive relief is barred by the Eleventh Amendment. The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State. U.S. Const. Amend. XI.

This Amendment does not expressly prohibit suits in federal court against a state by its own citizens, but it has long been interpreted to bar such suits. Hans v. Louisiana, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890); Luckey v. Harris, 860 F.2d 1012 (11th Cir. 1988).

In this case, Petitioner sought injunctive relief under 42 U.S.C. § 1983 which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . .

42. U.S.C. § 1983.

Petitioner's complaint stated a number of viable claims under 42 U.S.C. § 1983. Respondents clearly violated Petitioner's constitutional and statutory rights. These rights were violated by two non-policy making lower-level employees, therefore making Petitioner's only remedy a suit against Respondents AHEARN and CARD, individually under a § 1983 action.

In the case at bar, Respondents clearly violated Petitioner's statutory rights by totally disregarding Harris County Children's Protective Services own guidelines which were specifically designed by the State and Harris County to protect a parent while a complaint is being investigated by the childrens protective service workers.

Furthermore, Respondent's violated Petitioner's fundamental rights guaranteed to a person by the United States Constitution, including the right of life, liberty, and the pursuit of happiness. These fundamental constitutional rights were violated when Respondents deprived Petitioner of the right to be a parent to his children. Respondents knew or should have known that Petitioner was entitled to

due process prior to violating his constitutional rights.

Respondents violated Petitioner's fundamental right emanating from the Constitution, which protects the integrity of the family unit from unwarranted intrusions by the state. The Courts are required to carefully scrutinize any attempt to intrude upon these rights. Moore v. Sims, 442 U.S. 415, 99 S. Ct. 2371 (1979).

Respondents violated Petitioner's due process rights by failing to contact Petitioner to notify him that a sexual abuse complaint had been filed against him. Petitioner was never interviewed by Respondents, nor were the sexual abuse allegations verified or documented by photographs, witnesses, medical statements, or statements from any professional person. Furthermore, Respondents never notified

Petitioner of the results of the investigation. Petitioner was not made aware that there was a complaint or any type of investigation had occurred until Petitioner appeared for a hearing in the Family Courts several months later. At that point, the investigation had already been completed, leaving Petitioner no chance to defend himself, attend the videotape sessions, or to confront the witnesses.

Due process requires a fair and impartial trial before a competent tribunal which includes an opportunity to be heard, and reasonable opportunity to prepare for the hearing. To prepare for a hearing, an individual must have reasonable notice of the claim or charge against him so as to advise him of the nature thereof, and the relief sought. In the Interest of B

M N , 570 S.W. 2d 493 (Tex. App. - Texarkana 1978, no writ).

Based upon the above-referenced facts, it is clear that Respondents' contention that Petitioner failed to state a claim under 42 U.S.C. § 1983 is not true.

The case law is undisputed that actions seeking injunctive relief under 42 U.S.C. § 1983, consistent with the Eleventh Amendment, are permissible in federal court even if they require the state to expend some public funds in implementing relief and thus even if the award has an ancillary effect on the state treasury. Edelman v. Jordan, 415 U.S. 651, 677, 94 S. Ct. 1347, 1362, 39 L. Ed. 2d 662 (1973); Jackson Sawmill Co. v. United States, 580 F.2d 302, 309 (8th Cir. 1978), cert. denied, 439 U.S. 1070, 99 S. Ct. 839 59 L. Ed. 2d 35 (1979).

In Petitioner's complaint, he requests injunctive relief. Therefore, his claim for injunctive relief under 42 U.S.C. § 1983 should not be denied.

Petitioner has also alleged that his liberty interest which are protected under the due process clauses of the Fifth and Fourteenth Amendments were denied by Respondents during their investigation.

A complaint should not be dismissed or denied unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief. McLain v. Real Estate Board of New Orleans, 444 U.S. 232, 246, 100 S. Ct. 502, 511, 62 L. Ed. 2d 441 (1980); Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976).

In the case at bar, Petitioner has shown enough evidence to prove a number of facts that would support his claim that he is entitled to injunctive relief.

The law clearly states that the Eleventh Amendment is no bar to a suit against state officials to restrain unconstitutional acts undertaken in their official capacities. The law recognizes the right of an interested party to force state officials to act in accordance with the Constitution. Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974); U.S.C.A. Const. Amend. 11.

The Eleventh Amendment's immunity is unavailable to state officials where an action of constitutional proportions is brought for injunctive relief. Id. at 706; Georgia R. R. and Banking Co. v. Redwine,

342 U.S. 299, 72, S. Ct. 321, 96 L. Ed. 335 (1952).

II.

Whether individuals employed as field workers for a county childrens protective agency are entitled to a good faith exemption under the Eleventh Amendment.

Petitioner named Respondents STEM and AHEARN, individually, in his complaint because each of them personally violated the Constitution and Petitioner's constitutionally protected rights of life, liberty, and the pursuit of happiness. Because of this deprivation of his rights, Petitioner sued for injunctive relief.

Personal action by Respondents individually is not a necessary condition of injunctive relief against state officers in their official capacity. All that is

required is that the official be responsible for the challenged action.

This exception to the Eleventh Amendment is stated in Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). As the Young court held, it is sufficient that the state officer sued must, "by virtue of his office, have some connection" with the unconstitutional act or conduct complained of. "Whether this connection arises out of general law, or is specially created by the act itself, is not material so long as it exists". Young, 209 U.S. 157, 28 S. Ct. at 453,; Luckey v. Harris, 860 F.2d 1012 (11th Cir. 1988).

Respondents, AHEARN and CARD, did not act in good faith in their handling of the complaint alleged against Petitioner. In this case, Respondents were grossly negligent in the investigation of the

complaint therefore not entitling Respondents to any good-faith exception to the Eleventh Amendment.

Petitioner is permitted by law to seek injunctive relief under the exception to the Eleventh Amendment. The Eleventh Amendment is no bar to suit against state officials to restrain unconstitutional acts undertaken in their official capacities. The law recognizes the right of an interested party to force state officials to act in accordance with the Constitution. Jordan v. Gilligan, 500 F.2d 701 (1974).

The scope of the exception to the Eleventh Amendment focuses not on the source or amount of funds required to be expended if relief were granted, but on whether the funds were required to be expended as compensation for past wrongdoing by the state or as an "ancillary effect" of

compliance with the court order. As the Supreme Court explained in Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974),

> State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex parte Young.

Id. at 668, 94 S. Ct. at 1358. See also, Milliken v. Bradley, 433 U.S. at 289, 97 S. Ct. at 2461 (Eleventh Amendment no bar to court order that state defendants pay one-half costs attributable to education components in school desegregation plan; the Young exception "permits federal courts to enjoin state officials to conform their conduct to requirements of federal law,

notwithstanding a direct and substantial impact on the state treasury").

The key to determining the difference between the type of relief barred by the Eleventh Amendment and that permitted under the exception is a narrow one. The key, however, is whether an expenditure is a "necessary result of compliance with decrees which by their terms are prospective in nature, or a goal in itself". Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974).

When this test is applied to the relief Petitioner seeks, it is clear that the Eleventh Amendment does not bar this suit. Petitioner seeks an order to compel Respondents to conduct their investigations in a manner that meets minimum constitutional standards. While the state may ultimately finance compliance with such

an order, this fact is not determinative. Any funds that the State of Texas may be required to spend would be an ancillary effect on future compliance with constitutional standards. The relief sought by Petitioner in this case falls within the Ex parte Young exception to the Eleventh Amendment's general prohibition of suits brought against a state by its own citizens.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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November, 1990

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2641

Stephen C. Stem,

Plaintiff-Appellant,

versus

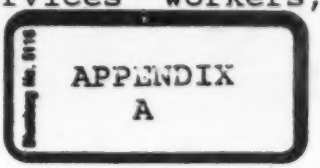
Ralph Ahearn and Chris Card,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas, Houston Division; Lynn H. Hughes, Judge. (CA)

Argued:
Decided: August 13, 1990

Father who was target of child molestation investigation brought action asserting constitutional claims against child protective services workers, investigating



agency and county. The United States District Court for the Southern District of Texas, Lynn H. Hughes, J., granted partial summary judgment in favor of agency and county, and workers appealed. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that workers enjoyed immunity from liability in both their official and personal capacities.

Reversed and remanded.

Court of Appeals may entertain appeals although seemingly interlocutory in nature, prosecuted by public officials who seek to challenge district court's determination that they do not enjoy either absolute or qualified immunity from suit; however, district court's denial of motion for summary judgment because of perceived lack of qualified or absolute immunity constitutes appealable "final decision" only if immunity

defense turns upon issue of law and not of fact.

See publication Words and Phrases for other judicial constructions and definitions.

Eleventh Amendment generally divests federal courts of jurisdiction to entertain citizen suits directed against states. U.S. C.A. Const. Amend. 11.

Eleventh Amendment is not evaded when citizen sues state employees in their official capacity, since such indirect pleading device remains in essence a claim upon state treasury. U.S.C.A. Const.Amend. 11.

States may voluntarily waive Eleventh Amendment protection, if unequivocally expressed, or Congress may forcibly pierce state sovereign immunity. U.S.C.A. Const. Amend. 11.

State's political subdivisions, such as counties and municipalities, do not fall within protection of Eleventh Amendment. U.S.C.A. Const.Amend. 11.

In determining whether entity is organ of state or county government for Eleventh Amendment immunity purposes, court examines: whether state law views entity as arm of state; source of entity's funding; degree of local autonomy retained; whether entity is concerned primarily with local, as opposed to statewide problems; whether entity has authority to sue and be sued in its own name; and whether entity retains right to hold and use property. U.S.C.A. Const. Amend. 11.

Child protective services employees were state, rather than county, employees for Eleventh Amendment immunity purposes, and, thus, were immune from suit in their official capacities. U.S.C.A. Const.Amend. 11.

Child protective services workers were entitled to qualified immunity in action against them in their personal capacities by father who was target of child molestation investigation; father failed to show that workers breached clearly established statutory or constitutional rights of which reasonable person would have known.

Child protective services employee's offering judicial testimony adverse to father at child custody hearing did not implicate due process concerns and, further, it constituted witness testimony that was absolutely immune form § 1983 liability. U.S.C.A. Const.Amend 14; 42 U.S.C.A. § 1983.

Due process did not require parents to be informed of pending Texas Department of Human Services investigation regarding child abuse or to be heard by Department investigators. U.S.C.A. Const.Amend. 14.

Because Texas Department of Human Services was engaged in purely fact-finding activities, it was not bound by Sixth Amendment confrontational restraints and, thus, father accused of child molestation did not have right to confront his accusers before Department investigators. U.S.C.A. Const.Amend. 6.

Appeal from the United States District Court for the Southern District of Texas.

Before WISDOM, SMITH, and BARKSDALE, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

This civil rights action follows an acrimonious child-custody dispute, with one parent leveling charges of child molestation against her former husband. Child protective

services workers investigated and concluded, despite medical evidence to the contrary, that the father had sexually abused his minor daughter. As a consequence of this investigation, the mother secured a temporary state court order certifying herself as the exclusive conservator of the child.

Enjoined by court-ordered visitation, the father was denied access to his daughter for over four months. He asserts constitutional claims against the child protective services workers, the investigating agency, and the county. Among other charges, the father maintains that his fundamental parental rights were terminated without due process of law, and independently, that the investigation of the alleged molestation was orchestrated negligently and impinged upon various constitutional guarantees.

The district court granted partial summary judgment in favor of the agency and county. The court declined to grant summary judgment in favor of the individual defendants, however, concluding that they are not immune from suit in either their individual or official capacities. This appeal follows that adverse immunity determination. Concluding that the child protective services workers enjoy immunity from liability, in both their official and personal capacities, we reverse.

I.

Stephen Stem agreed informally with his estanged wife, Lee Anne, to share custody of their two minor children pending a final decree of divorce. However, before a state court had the occasion to adjudicate custodial rights, the wife accused Stem, after the child's return from a weekend

visit, of sexually abusing the minor daughter. Lee Anne did not confront her husband immediately about the child's well-being, electing instead to take her to the hospital for a physical examination. That examination evinced no medical evidence of molestation. The examining physician, however, dutifully notified the Harris County Children's Protective Services (HCCPS) of the alleged sexual abuse.

Ralph Ahearn is the child protective services employee charged with the investigation of this case. After interviewing the wife and child, Ahearn concluded, based upon his professional experience, that Stem had indeed molested his daughter , despite the lack of medical corroboration. Ahearn, however, never interviewed Stem or notified him of his investigation. Stem first learned of HCCPS's

investigation when the agency petitioned to secure a temporary state court order to confer exclusive possessory conservatorship of the child upon his wife.

Stem argues that the investigation of the charge of child molestation, raised by his estranged wife, was so grossly negligent that it served to terminate fundamental parental rights in contravention of the process minimally due under the Constitution. Specifically, he was never given notice of the investigation or given an opportunity to be heard on the sexual-abuse charges prior to his condemnation, before HCCPS, of being a molester. Presumably, an interview would have cured any suspicion harbored by HCCPS investigators.

Relying upon alleged breaches of the fifth, sixth, and fourteenth amendments, Stem seeks $7 million in actual and punitive

damages under 47 U.S.C. § 1983 against Harris County, HCCPS, Ahearn, and his supervisor, Chris Card, both of whom are sued in their official and private capacities. The Attorney General of Texas answered the civil complaint on behalf of all named defendants.

On motion for summary judgment, the district court agreed with the Attorney General that HCCPS is an organizational arm of the Texas Department of Human Services (TDHS) and that such a state agency enjoys eleventh amendment immunity. Further, Harris County, like all instruments of county government, cannot be held vicariously liable for the actions of state agencies, as essentially charged in the complaint.

However, the district court declined to grant summary judgment in favor of Ahearn or Card, reasoning that neither enjoys eleventh amendment or qualified immunity. This

interlocutory appeal is thus limited to the immunity, if any, available to these child protective services workers, in their official and individual capacities.

II.

A.

[1] We may entertain appeals, although seemingly interlocutory in nature, prosecuted by public officials who seek to challenge the district court's determination that they do not enjoy either absolute or qualified immunity from suit.[1] However, the

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[1] See, Mitchell v. Forsyth, 472 U.S. 511, 524-30, 105 S.Ct. 2806, 2814-18, 86 L.Ed.2d 411 (1985) (denial of qualified immunity is immediately appealable as a final order under 28 U.S.C. § 1291); Nixon v. Fizgerald, 457 U.S. 731, 742-43, 102 S.Ct. 2690, 2697-98, 73 L.Ed.2d 349 (1982) (denial of absolute immunity immediately appealable); Nieto v. San Perlita Ind. School Dist., 894 F.2d 174, 176-77 (5th Cir. 1990) (court has jurisdiction under Mitchell to review the district court's denial of summary judgment

district court's denial of a motion for summary judgment because of the perceived lack of qualified or absolute immunity constitutes an appealable "final decision" only if, as here, the immunity defense turns upon an issue of law and not of fact.[2]

B.

[2, 3] The eleventh amendment generally divests federal courts of jurisdiction to entertain citizen suits directed against states. Port Authority Trans-Hudson Corp. v. Feeney, --- U.S. ---, 110 S.Ct. 1868, 1872,

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predicated upon qualified immunity); Loya v. Texas Dep't of Corrections, 878 F.2d 860, 861 (5th Cir. 1989) (per curiam) (denial of motion to dismiss on the ground of eleventh amendment immunity is a "final decision" appealable under 28 U.S.C. § 1291).

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See, Thompson v. City of Starkville, 901 F.2d 456, 469 (5th Cir. 1990); Brawner v. City of Richardson, 855 F.2d 187, 190-91 (5th Cir. 1988).

109 L.Ed.2d 264 (1990); Edelman v. Jordan, 415 U.S. 651, 662-63, 94 S.Ct. 1347, 1355-56, 39 L.Ed.2d 662 (1974). The amendment is not evaded by suing state employees in their official capacity, since such an indirect pleading device remains in essence a claim upon the state treasury. See, Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 101-02, 104 S.Ct. 900, 908-09, 79 L.Ed.2d 67 (1984); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464, 65 S.Ct. 347, 350, 89 L.Ed 389 (1945).

[4] The state, of course, may voluntarily waive eleventh amendment protection, if unequivocally expressed, Port Authority, 110 S.Ct. at 1873, or Congress may forcibly pierce state sovereign immunity to the extent allowed, for example, by section 5 of the fourteenth amendment, Will v. Michigan Dep't of State Police. --- U.S. ---, 109

S.Ct. 2304, 2309, 105 L.E.2d 45 (189). However, it remains a settled constitutional principle that the eleventh amendment divests the federal judiciary of jurisdiction to hear citizen suits designed, ultimately, to secure monetary recovery from nonconsenting states. It is irrelevant for purposes of eleventh amendment immunity that the action is framed against the state directly or indirectly against subordinate agencies or officeholders operating in their official capacities.

Significantly, Texas has not consented to be sued in federal court by resident or nonresident citizens regarding its activities to protect the welfare of children, nor has state sovereign immunity been eviscerated by Congress with the passage of section 1983. The Will Court, in fact, held that states and state officials sued in their official capacity are not deemed "persons" subject to

suit within the meaning of section 1983. Id. 2309, 2311-12.

[5] Thus, if Ahearn and Card are deemed Texas state employees, we lack subject matter jurisdiction to adjudicate claims fashioned against them in their official capacity. If, however, they are essentially Harris County employees, eleventh amendment immunity is not implicated, since political subdivisions, such as counties and municipalities, do not fall within the amendment's protection. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 400-01, 99 S.Ct. 1171, 1176-77 59 L.Ed.2d 401 (1979); Jacintoport Corp. v. Greater Baton Rouge Port Comm'n, 762 F.2d 435, 438 (5th Cir. 1985), cert. denied, 474 U.S. 1057, 106 S.Ct. 797, 88 L.Ed.2d 774 (1986). Not surprisingly, the child protective services workers claim to be employees of TDHS, undisputedly an organ of

state government. See, Tex. Hum. Res. code Ann. chs. 11, 21 (Vernon 1990) (TDHS created by legislature). Predictably, Stem asserts that the defendants are strictly Harris County child protective services employees.

[6] In determining whether an entity is an organ of state or county government for eleventh amendment immunity purposes, we examine the following nonexhaustive list of factors: (1) whether state law views the entity as an arm of the state; (2) the source of the entity's funding; (3) the degree of local autonomy retained; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has authority to sue and be sued in its own name; and (6) whether the entity retains the right to hold and use property. Clark v. Tarrant County, 798 F.2d 736, 744-45 (5th Cir. 1986); accord McDonald v. Board of

Mississippi Levee Comm'rs, 832 F.2d 901, 906 (5th cir. 1987). The Clark factors are not designed to be applied mathematically but, when viewed in combination, aid considerably in resolving the immunity enjoyed by both the entity and its employees.

[7] With little difficulty, we conclude that Ahearn and Card are state, not county, child protective services employees. This conclusion is consistent with the view of Texas courts, which regard child protective services workers as instruments of state power, and thus, state employees for immunity purposes. See. e.g., Russell v. Texas Dep't of Human Resources, 746 S.W.2d 510, 513-14 (Tex. App. - Texarkana 1988, writ denied) (child protective services workers treated as state employees); Austin v. Hale, 711 S.W.2d

64, 66-67 (Tex. App. - Waco 1986, no writ) (same).

Functionally HCCPS, and thus Ahearn and Card, are governed by the TDHS commissioner, the administrator of a state agency. See, e.g., Tex. Hum Res. Code Ann. §§ 21.004, 21.005 (Vernon 1990). Further, the defendants were hired and trained by the state, and they remain, as Stem admits, subject to TDHS regulations. They are paid exclusively by the state and can be terminated by it.

Ahearn and Card derive their authority to investigate cases of child abuse from Texas statutory law, which is designed to address an alarming state wide problem of maltreatment of children. See, Tex. Fam. Code Ann. §§ 34.05, 34.052, 34.053 (Vernon Supp. 1990) (authorizing TDHS to investigate reports of child abuse). Significantly, any

civil judgment rendered against the workers, for injuries caused as a consequence of their official duties, necessarily would be satisfied by state funds. When viewed in combination, we conclude that the Clark factors weigh heavily in favor of state, not county, employment for the individual defendants here.

We recognize that Harris County provides HCCPS with physical facilities as well as limited funding and administrative support. Nevertheless, we are not persuaded that such limited support, coupled with the attachment of "Harris County" to HCCPS, carries particular significance for immunity purposes. Organizationally, HCCPS constitutes one of many geographically identifiable departments of TDHS. Accordingly, we grant summary judgment in

favor of Ahearn and Card in their official capacities.

C.

Where the power of government is abused by officeholders, and sovereign immunity stands in the way, monetary recovery from the responsible individuals serves as an important mechanism to vindicate constitutional guarantees. See, Butz v. Economou, 438 U.S. 478, 506, 98 S.Ct. 2984, 2910, 57 L.Ed.2d 859 (1978). However, these same public officeholders are due a measure of protection from "insubstantial lawsuits" and the effects of ruinous litigation. See, id. at 506-08, 98 S.Ct. at 2910-12. Qualified immunity thus serves as an accommodation to competing public policy interests, which are designed to secured both a government that is accountable and one that can function. See, Anderson v. Creighton,

483 U.S. 635, 638, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987).

[8] To hold the child protective services workers personally liable here, Stem must pierce the qualified immunity that they inherently enjoy by demonstrating that the workers breached "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). That is, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson, 483 U.S. at 640, 107 S.Ct. at 3039. Further, the applicable law that binds the conduct of officeholders must be clearly established at the very moment that the allegedly actionable conduct was taken. Harlow, 457 U.S. at 818,

102 S.Ct. at 2738; Anderson, 483 U.S. at 639, 107 S.Ct. at 3038. For purposes of summary judgment, courts are not at liberty to view the applicable law with the advantage of hindsight. See, Harlow, 457 U.S. at 818, 102 S.Ct. at 2738.

We have recently encountered a case factually similar to the instant dispute. In Hodorowski v. Ray, 844 F.2d 1210 (5th Cir. 1988), aggrieved parents brought a section 1983 action against Texas child protective services workers who temporarily removed the plaintiffs' children from the family home without a court order. We held that child protective services workers are entitled to, minimally, qualified immunity to ensure that an effective child-abuse investigation system exists. Id. at 1216. We rejected the TDHS workers' claim of entitlement to absolute immunity, however, for fear of immunizing

intentional violations of clearly established law. See, id. at 1212-13.[3]

To survive a motion for summary judgment against a likely defense of qualified immunity, "the plaintiff's complaint [must] state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of

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We noted in Hodorowski that other circuits confer absolute immunity upon social service workers concerned with the protection and welfare of children under the rationale that their actions are analogous to those of prosecutors, or because their actions qualify as witness testimony, both of which merit absolute immunity. See, e.g., Gardner v. Parson, 874 F.2d 131, 145-46 (3d Cir. 1989); Meyers v. Contra Costa County Dep't of Soc. Servs., 812 F.2d 1154, 1156-57 (9th Cir.), cert. denied, 484 U.S. 829, 108 S.Ct. 98, 98 L.Ed.2d 59 (1987); Kurzawa v. Mueller, 732 F.2d 1456, 1458 (6th Cir. 1984).

immunity." Elliott v. Perez, 751 F.2d 1472, 1473 (5th Cir. 1985). In this case, Stem makes various conclusory allegations to the effect that he was deprived of due process of law, equal protection under the law, the rights secured by the privileges and immunities clause of the fourteenth amendment, and, curiously, "life, liberty, and the pursuit of happiness."

The few relevant facts that Stem pleads do not implicate the constitutional guarantees at issue, and no plain violation of clearly established law, as the law existed pending this investigation, is identified. While Stem cites caselaw for the purpose of demonstrating the existence in our jurisprudence of certain fundamental parental rights, our precedent is not supportive of his bold propositions, such as the assertion that parents must be given notice by HCCPS

before a child-abuse investigation can commence. In fact, the caselaw is overwhelmingly adverse to Stem's position, which gives us pause to consider whether this suit was initiated in good faith.

Stem, for example, heavily relies upon Chalkboard, Inc. v. Brandt, 879 F.2d 668 (9th Cir. 1989), superseded, 902 F.2d 1375 (9th Cir. 1990), for the proposition that the child protective services workers here violated a clearly established due process right. However, Brandt is completely inapposite, since that case concerns an Arizona agency's summary suspension of a day-care center's operating license, admittedly a vested property interest, without a prior agency hearing. It is well settled that private property interests cannot be forcibly removed by the state without threshold procedural safeguards.

However, in this case, Stem's parental rights were not impinged until after a state court hearing and, thus, unlike the day-care center, he received all the process constitutionally due.

[9] Stem ignores the fact that his parental rights were impinged only after a judicial hearing at which he was fully heard. Ahearn and Card never physically removed Stem's child from him or otherwise altered his parental rights under the law, although Ahearn did testify in court concerning his investigatory conclusions and did advise the mother to keep the daughter away from the plaintiff. However, offering adverse judicial testimony at a child-custody hearing does not implicate due process concerns and, further, it constitutes witness testimony that is absolutely immune from section 1983 liability. See, Briscoe v.

LaHue, 460 U.S. 325, 342-47, 103 S.Ct. 1108, 1119-22, 75 L.Ed.2d 96 (1983)(police officer's judicial testimony absolutely immune from section 1983 liability).

[10, 11] Nor does due process require parents, as Stem asserts, to be informed a pending TDHS investigation regarding child abuse or be heard by TDHS investigators. The law of Texas is such that only a court, not TDHS, is empowered to adjudicate or terminate parental rights. Ahearn and Card are completely powerless to adjudicate Stem's parental rights and, thus, like police officers, do not need to abide by trial-like procedures incident to their fact-finding mission. Further, the sixth amendment does not, as Stem suggests, vest in him a right to confront his accusers before TDHS investigators, since governmental agencies that are engaged in purely fact-finding

activities are not bound by sixth amendment confrontational restraints. Hannah v. Larche, 363 U.S. 420, 449, 80 S.Ct. 1502, 1518, 4 L.Ed.2d 1307 (1960) (investigating agencies not bound by trial-like procedures).

III.

Finding the remaining arguments raised by Stem to be completely devoid of merit, we conclude as a matter of law that the individual defendants' official and qualified immunity bars the continuation of this suit against them. Accordingly, we REVERSE and REMAND this matter for further proceedings consistent herewith, including the entry of summary judgment in favor of Ahearn and Card.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STEPHEN C. STEM,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO.
	§	H-88-2813
	§	
RALPH AHEARN, ET AL,	§	
	§	
Defendants.	§	

ORDER

Ahearn and Card's Motion to stay proceedings during the pendency of the appeal is denied.

Signed on October 30, 1989, at Houston, Texas.

Lynn N. Hughes
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STEPHEN C. STEM,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO.
	§	H-88-2813
	§	
RALPH AHEARN, ET AL,	§	
	§	
Defendants.	§	

ORDER

The Texas Department of Human Service's Motion for Leave to File Amended Answer is granted.

Signed on August 9, 1989 at Houston, Texas.

Lynn N. Hughes
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STEPHEN C. STEM,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO.
	§	H-88-2813
	§	
RALPH AHEARN, ET AL,	§	
	§	
Defendants.	§	

ORDER

Harris County and the Board of Harris County Children's Protective Service are dismissed.

The remaining motions for summary judgment are denied without prejudice.

Stem takes nothing by his claim under 42 U.S.C. § 1985.

The State shall produce all documents and answer interrogatories by August 4, 1989.

Signed on July 31, 1989, at Houston, Texas.

Lynn N. Hughes
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STEPHEN C. STEM,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO.
	§	H-88-2813
	§	
RALPH AHEARN, ET AL,	§	
	§	
Defendants.	§	

ORDER

Harris County Children's Protective Service's motions to dismiss and for summary judgment are denied. Suzanne Berkel is allowed to appear pro hac vice.

Signed on October 18, 1988, at Houston, Texas.

Lynn N. Hughes
United States District Judge